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Daniel Gervais

Vanderbilt University Law School, daniel.gervais@vanderbilt.edu

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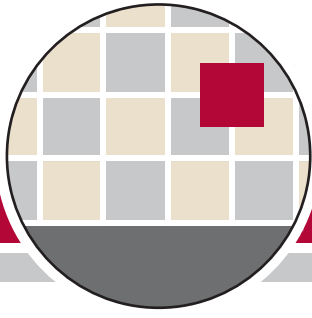
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The Protection of Performers under U.S. Law in Comparative Perspective

Daniel Gervais, Ph.D.*

INTRODUCTION

The majority opinion of the Ninth Circuit panel in *Garcia v. Google, Inc.*¹ stands for the proposition that an actor has copyright in her performance. The case was described as horrific and generated a significant amount of traffic on LISTSERVs and social media.²

In the opinion, Chief Judge Kozinski made three key points. First, that there was originality in the performance, as required under *Feist*³. The *Feist* court found that creative choices were necessary to generate sufficient originality to warrant copyright protection. Using *Feist* as backdrop, the *Garcia* majority found that:

An actor's performance, when fixed, is copyrightable if it evinces "some minimal degree of creativity . . . 'no matter how crude, humble or obvious' it might be." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, That is true whether the actor speaks, is dubbed over or, like Buster Keaton, performs without any words at all.⁴

Second, Chief Justice Kozinski found that a performance could be a derivative work of the script, noting that an unauthorized derivative received no copyright protection.⁵

Third, he dismissed what might seem like a Coasean argument on the impossibly high

* Professor of Law, Vanderbilt University Law School; Director, Vanderbilt University Intellectual Property Program.

1. 743 F.3d 1258 (9th Cir. 2014). An en banc review was pending as of this writing.

2. Mike Masnick, *Horrific Appeals Court Ruling Says Actress Has Copyright Interest in 'Innocence Of Muslims,' Orders YouTube to Delete Every Copy*, TECHDIRT, Feb. 26, 2014, available at <https://www.techdirt.com/articles/20140226/12103626359/horrific-appeals-court-ruling-says-actress-has-copyright-interest-innocence-muslims-orders-youtube-to-delete-every-copy.shtml>.

3. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). For a discussion see Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49:4 J. COPYRIGHT. SOC'Y OF THE U.S.A. 949, 951-54 (2001-2002).

4. *Garcia*, 743 F.3d at 1263 (first omission in original and second omission added).

5. *Id.* at 1264 ("Where, as here, an actor's performance is based on a script, the performance is likewise derivative of the script, such that the actor might be considered to have infringed the screenwriter's copyright.").

transaction costs if a thicket of copyrights were recognized in film because:

As the above discussion makes clear, any analysis of the rights that might attach to the numerous creative contributions that make up a film can quickly become entangled in an impenetrable thicket of copyright. But it rarely comes to that because copyright interests in the vast majority of films are covered by contract, the work for hire doctrine or implied licenses.⁶

The dissent also makes interesting points, in particular in drawing a clear distinction between a performance and a work in a copyright context—a distinction which, the dissent opines, is solidly anchored in the text of the statute:

Section 101 of the Act is also instructive, because it differentiates a work from the performance of it. It defines “perform a ‘work’” to mean “to recite, render, play, dance or *act it*.” 17 U.S.C. § 101 (emphasis added). Given this provision, it is difficult to understand how Congress intended to extend copyright protection to this acting performance. . . . An acting performance resembles the “procedure” or “process” by which “an original work” is performed. . . . Therefore, “[i]n no case does copyright protection” extend to an acting performance, “regardless of the form in which it is described, illustrated, or embodied in” the original work.⁷

Wherever this case ends up in the courts, it raises fundamental questions about US law as it applies to performed works. This Essay uses a comparative lens to shed some hopefully useful light on the debate. The Essay proceeds essentially in two parts. First, the Essay explores and critiques the international protection of performers’ rights using both history and policy as focal points. The following part describes the protection of performers and other owners of “related rights” in US law and explains the differences that adopting a related rights regime would bring about in the United States.

II. THE INTERNATIONAL PROTECTION OF PERFORMERS

A. Are Performances Works?

The dissent in *Garcia* is correct of course in pointing out that the Copyright Act draws a distinction between works and performances.⁸ That is not dispositive, however. It is not because a performance is a performance that it then cannot also be a work.

6. *Id.* at 1265.

7. *Id.* at 1270 (Smith, J., dissenting) (emphasis in original) (omissions added).

8. See 17 U.S.C. § 101 (“work” and “perform”). The statute uses the term “performance” elsewhere, such as in 17 U.S.C. § 110, and apparently to mean something other than “work” because it refers to “performance(s) of a work.”

knot.”¹⁴

This sounds like opting for a separate category of rights and excluding performers from copyright might decide the issue from a policy angle but again, it does not. Far from it. For one thing, in copyright, “proper” copyright protection is granted to authors of original photographs, though there is no formally agreed criterion to define originality in this context.¹⁵ Some more “technical” photography (where there is little if any room to make a creative contribution) might thus be excluded.¹⁶ Indeed, a number of countries provide separate protection for nonoriginal photographs.¹⁷ It is, in other words, a complicated matter. Let us dive a little deeper into the matter.

B. The Emergence of Neighboring Rights and the Rome Convention

From an international perspective, the debate about whether performances can also be copyrighted works seems a bit surreal nowadays because performers’ rights are protected as related or neighboring rights, that is, rights related to, or neighboring on, copyright proper.¹⁸ Where does this spate protection of performers come from?

The protection of performers was discussed during much of the twentieth century.¹⁹ Efforts

14. *See id.*

15. *See* Sam Ricketson, *International Conventions*, in *COPYRIGHT AND PHOTOGRAPHS: AN INTERNATIONAL SURVEY* 15, 24 (Ysolde Gendreau et al., eds., 1999).

16. *See, e.g.*, *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542 (S.D.N.Y. 2001) in which the court held that pictures of Chinese food dishes taken for a menu lacked sufficient artistic quality to be copyrightable. The originality bar even of pictures of preexisting art is set quite low. *See* *FragranceNet.com, Inc. v. FragranceX.com, Inc.* 679 F. Supp. 2d 312 (E.D.N.Y. 2010). Judge Kaplan discussed the issue at length in a comparative (UK/US) perspective in *Bridgeman Art Library, Ltd. v. Corel Corp.* 25 F. Supp. 2d 421 (S.D.N.Y. 1998).

17. For example in the Nordic countries, “‘simple’ photographs, which are photographic products that do not meet the originality criterion, have a shorter and lesser protection than artistic works.” Rainer Oesch, *Nordic Countries*, in *COPYRIGHT AND PHOTOGRAPHS: AN INTERNATIONAL SURVEY* 231, 262 (Ysolde Gendreau et al., eds., 1999). The same is true under section 72 of the German Copyright Act. *See* Axel Nordemann, *Germany*, in *COPYRIGHT AND PHOTOGRAPHS: AN INTERNATIONAL SURVEY* 135, 140 (Ysolde Gendreau et al., eds., 1999).

18. The expression “neighboring rights” is commonly used to refer to rights “granted by the Rome Convention to performers, producers of phonograms and broadcasting organizations.” WORLD INTELLECTUAL PROPERTY ORGANIZATION, *GUIDE TO THE ROME CONVENTION AND THE PHONOGRAMS CONVENTION* 7 (1981) [hereinafter *GUIDE*]. Reference is made here to the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, Oct. 26, 1961, 496 U.N.T.S. 43, available at http://www.wipo.int/treaties/en/ip/rome/pdf/trtdocs_wo024.pdf [hereinafter *Rome Convention*]. The expression related rights is used by the European Union and the World Trade Organization’s *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods: General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round)*, 33 I.L.M. 81, art. 13 (December 15, 1993), available at http://www.wto.int/english/docs_e/legal_e/27-trips.pdf [hereinafter *TRIPS Agreement*].

19. *GUIDE*, *supra* note 19, at 7.

to protect at least some performances were initially supported by the same organization that drafted the main international copyright treaty, namely the Berne Convention.²⁰ The original text of that Convention (September 1886) was updated by the adoption of a protocol or revised several times, namely in Paris (1896), Berlin (1908), Rome (1928), Brussels (1948), and Stockholm (1967).²¹ An Appendix for developing countries was added to the Stockholm text, and the combination is now referred to as the “Paris Act” of the Berne Convention.²² It is at the 1948 conference in Brussels that it almost happened. As professors Ricketson and Ginsburg explain, in 1939, the International Office²³ had prepared draft provisions “connected with” the Berne Convention that would have protected performers.²⁴

The document was discussed but the outbreak of World War II, which led to the postponement of the revision conference (eventually held in 1948), also meant that the issue of performers’ rights had to be set aside at that conference because Berne member countries, “many of whom had been on opposite sides during the recent war,” had diverging views on the matter.²⁵

Performers did not abandon their quest. A new coalition was formed. It created a role not just for BIRPI/WIPO as in previous discussions but also for UNESCO, a new organization at the time created (with the United Nations) after World War II. UNESCO was active early on in copyright circles with the adoption of the Universal Copyright Convention in 1952, with support from the United States.²⁶ Perhaps more importantly, the International Labor Office (ILO), which was “concerned with the interests of performers, as the victims of tech-

20. *Id.* (“[T]he international Literary and Artistic Association (ALAI) at its Congress in Weimar in 1903 looked sympathetically at the light of solo performers.”) Reference is made here to the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886; revised July 24, 1971 and amended 1979; entered into force for United States Mar. 1, 1989 (Sen. Treaty Doc. 99-27)) 1 B.D.I.E.L. 715 [hereinafter Berne Convention]. On the role of ALAI as drafter of the original text of the Berne Convention, see SAM RICKETSON AND JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* 49-58 (Oxford University Press, Inc. 2006) (1987).

21. An English version of all records of all those diplomatic conferences is available in WIPO, 1886-1986: *BERNE CONVENTION CENTENARY* 136-219 (1897).

22. *Id.* 220-23. See also RICKETSON AND GINSBURG, *supra* note 20, at 131-32.

23. That is, the *Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle* (BIRPI), the predecessor of WIPO. See WIPO, 1967-1992: *THE FIRST TWENTY FIVE YEARS OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION* 21-28 (1992).

24. RICKETSON AND GINSBURG, *supra* note 21, at 1210.

25. *Id.*

26. Universal Copyright Convention of September 6, 1952, 6 U.S.T. 2731, T.I.A.S. 3324, 216 U.N.T.S. 132, as revised at Paris on July 24, 1971. It came into force with respect to the United States on September 16, 1955. See Copyright Office, *Circular 38a: International Copyright Relations of the United States*, U.S. COPYRIGHT OFFICE May 1999, at 2, available at <http://www.copyright.gov/circls/circ38a.pdf>. For a discussion, see Yale Law Journal, *International Copyright Protection and the United States: The Impact of the UNESCO Universal Copyright Convention on Existing Law* 62 YALE L. J. 1065 (1953).

nological unemployment” due in large part to the invention of recording techniques, joined the debate.²⁷ This meant that the status of performers was considered not only as “creators” but also, and perhaps first, as employees.

A view held by many (mostly European) negotiators at the time was that at least some music performances could be considered “works” in their own right, but many also felt that parsing those worthy of “work” (i.e., full copyright) status from more “mechanical” performances (that is, not exhibiting sufficient “originality”), combined with strong pressure from certain associations of composers, doomed the case for recognition of full copyright for performers.

A first draft convention protecting the rights of performers separately from authors, and also those of sound recording producers and broadcasting organizations, was produced for a meeting in Rome in 1951²⁸. The ILO convened a separate meeting in Geneva in 1956 to draw up “detailed rules for the protection of performers.”²⁹ UNESCO and BIRPI organized a parallel meeting in Monaco a year later, which produced a different draft text.³⁰ The Geneva and Monaco drafts were combined and modified at The Hague in 1960.³¹ A text was finally adopted in Rome in October 1961.³²

Without purporting to summarize the Rome Convention, it is worth noting that it protects performers’ rights for a minimum period of 20 years computed from the end of the year in which fixation occurs or the performance took place.³³ Article 7 of the Convention provides performers with *inter alia* protection against unauthorized fixation of their performance and against the reproduction of such unauthorized fixations.³⁴ Also worth noting, while the Convention defines performers in a way that would protect not just music performers but also actors,³⁵ once a performer consents to incorporation of his performance into a visual or audiovisual fixation, then Article 7 has no further application.³⁶

Linguistically, the fact that not all performances are equal is quite visible in the text of the Convention itself. While the English version of the Rome Convention refers to “performers,”³⁷ the French and Spanish version use two words to distinguish two categories

27. RICKETSON AND GINSBURG, *supra* note 21, at 1211.

28. *Id.*

29. GUIDE, *supra* note 18, at 9.

30. *See id.*

31. *See id.*

32. RICKETSON AND GINSBURG, *supra* note 21, at 1211. *See also* GUIDE, *supra* note 19, at 9.

33. *Rome Convention*, *supra* note 19, art. 14.

34. *Id.* art. 7(1).

35. *Id.* art. 3(a) (“[P]erformers’ means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.”)

36. *Id.* art. 19 (“Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application.”)

37. *See Rome Convention*, *supra* note 18.

of performers. In French, the terms are *interprètes* and *exécutants*; in Spanish, *interpretes* and *ejecutantes*. This terminological distinction suggests that some performances are so tied to the underlying musical work that the performer merely “executes” them, almost in the way that a computer executes a program. Short of making mistakes, two equally skilled and competent performers should thus produce “executions” with little if any room to express their creativity. Other performances, however, put a personal touch and clearly add to the music as written, as in the Menuhin example above.³⁸

The laws of certain countries did incorporate that very distinction. As the Argentinean delegate to the Conference that adopted the 1961 Rome Convention explained:

Argentine law [...] protects *interpretes* (interpretative artistes) –without referring to *ejecutantes* (executant artistes)—had led to certain judicial decisions from the benefit of which executant artistes proper were in general excluded.³⁹

The distinction matters, because some performances, the distinction implies, may not rise to the level of originality required, but that may not be a valid reason to dismiss copyright protection of all performances. As Professors Ricketson and Ginsburg explain, the argument that performers (and in deed sound engineers, a matter to which this Essay returns below) use “technical skills” is no excuse to deny full copyright protection to at least certain performances.⁴⁰ After all, “the inclusion of photographs and cinematographic films within the scope of the Berne Convention undermines an argument that tries to distinguish the kind of skill applied in the creation of these various works.”⁴¹ Indeed, “[t]he truth is that there is no logical reason, based on the need for literary or artistic creation, why [performers] should not be protected under the Berne Convention.”⁴² The *Guide to the Rome Convention* goes a step further, in declaring that “performances of artistes are of their nature acts of spiritual creation.”⁴³

The ILO view that that recording techniques might make the work of performers less frequently necessary and thus lead to employment issues can, in fact, be seen as a *positive* development for performers’ rights. As the three intergovernmental organizations responsible for the administration of the Rome Convention noted:

Up to the end of the last [19th] century, the artistes’ offerings (actors in a play, operatic and concert singers, musicians playing pieces of music, circus and variety artistes doing their turns, etc.) had an ephemeral character. [...] The in-

38. See *supra* note 11 and accompanying text.

39. ILO, UNESCO, & BIRPI, RECORDS OF THE DIPLOMATIC CONFERENCE ON THE INTERNATIONAL PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS 77 (1968) [hereinafter RECORDS].

40. RICKETSON AND GINSBURG, *supra* note 21, at 1206.

41. *Id.*

42. *Id.* at 1206-07.

43. GUIDE, *supra* note 18, at 12.

vention of the gramophone, cinematography and radio, and their spread to an ever-wider public at the beginning of the 20th century, revolutionized the ways in which authors were able to publicize their work.⁴⁴

Recording techniques allowed performances the possibility of fixation, and hence, a relative degree of permanency. In this, they joined songwriters and composers who had long enjoyed the ability to use paper and pen to fix their work.

Still, in the end, performers were moved to the Rome Convention “hotch-potch” of norms, together with two other categories of right holders, namely sound recording (phonogram) makers and broadcasting organizations.⁴⁵ This arguably demotes performers vis-a-vis authors, but also puts them all on the same footing in determining whether their contribution is original or not.⁴⁶

C. Rome and Beyond

In part because the United States had issues with rights being recognized for performers and broadcasters, a separate convention, the Phonograms (or Geneva) Convention of 1971, was signed 10 years later.⁴⁷ This convention only protects the rights of the makers of a sound recording. The United States joined in 1974—after the introduction of sound recordings protection under federal copyright law.⁴⁸ The United States never joined Rome.⁴⁹

Since 1961, three major instruments have been adopted that affect the protection of performers. First, the TRIPS Agreement provides that in respect to a fixation of their performance on a phonogram,

performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed perfor-

44. *Id.* at 9.

45. The expression is used in *id.* at 12.

46. Much has been said in this context about Article 1 of the Rome Convention, which provides that “[p]rotection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.” *Rome Convention*, *supra* note 19, art. 1. Whether that Article actually establishes a hierarchy of norms between copyright and related rights is highly debatable but there is no room to fully explore the issue here.

47. *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Phonograms* (Geneva), Oct. 29, 1971, 25 U.S.T. 309 (1971). It took effect in the United States on March 10, 1974.

48. Congress extended federal copyright protection to sound recordings on February 15, 1972. See *Dowling v. United States*, 473 U.S. 207, 211 n. 4 (1985)..

49. On the problems that the United States had with the protection of performers under a “neighboring rights” regime, see 3 NIMMER ON COPYRIGHT, § 8E.01[A]. There have been many calls for the United States to join Rome. See e.g., Bonnie Teller, Note, *Toward Better Protection of Performers in the United States: A Comparative Look at Performers’ Rights in the United States, Under the Rome Convention And in France*, 28 COLUM. J. TRANSNAT’L L. 775 (1990).

mance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.⁵⁰

This requires WTO members to adopt an anti-bootlegging provision, and one was indeed incorporated into US law when the United States joined the WTO in 1995.⁵¹

With a second new instrument added to the mix, namely the 1996 *WIPO Performances and Phonograms Treaty*, performers now have most of the rights that authors enjoy under Berne, including a moral right, at least for countries party to the WPPT.⁵² The WPPT singles out two of the three Rome categories (performers and record producers). A possible treaty on the third Rome category (broadcasters) is currently under consideration at WIPO.⁵³

The third and last post-Rome instrument is the much more recent Beijing Treaty.⁵⁴ It provides a series of rights specifically for audiovisual performers (actors) who were abandoned by Rome once they had consented to a fixation of their performance.⁵⁵ The performers' rights contained in the Beijing Treaty include a right to authorize the fixation of direct and indirect reproduction of their performances.⁵⁶ The Treaty also provides, however, that a

Contracting Party may provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty

50. *TRIPS Agreement*, *supra* note 18, art 14.1.

51. Uruguay Round Agreements Act, § 4809, 108 Stat. at 4973-81 (1994) (Pub. L. No. 103-465, § 314). The provision is contained in 17 U.S.C. § 1101(c) (1994). For a discussion, *see* 3 NIMMER ON COPYRIGHT, § 8E.02 and § 8E.03[C][1]. *See also* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 12.04[A], at 375-76 and n.20 (2d ed. 1995).

52. WIPO Performances and Phonograms Treaty, 36 I.L.M. 76 (Geneva, 1997) (S. Treaty Doc. No. 05-17) [hereinafter WPPT]. Art. 5 of the WPPT provides that “[i]ndependently of a performer’s economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.” This language can be compared to Art. 6(b) of the Berne Convention, which provides a moral right for authors. 93 countries were party to the WPPT as of August 2014. *See* WIPO, *Contracting Parties > WIPO Performances and Phonograms Treaty*, available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20.

53. *See* WIPO, *Broadcasting Organizations*, available at <http://www.wipo.int/copyright/en/activities/broadcast.html>

54. WIPO, *Beijing Treaty on Audiovisual Performances*, June 24, 2012, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295837 [hereinafter *Beijing Treaty*]. For a discussion, *see* David Lange, *From Berne to Beijing: A Critical Perspective*, 16 VAND. J. ENT. & TECH. L. 1 (2013).

55. *See supra* note 36.

56. *Beijing Treaty*, *supra* note 55, arts. 6 and 7.

shall be owned or exercised by or transferred to the producer.”⁵⁷

III. RELATED RIGHTS IN THE UNITED STATES

The difficulty in squeezing the United States in a related rights regime is not hard to understand historically. The reasons not to adopt such a regime today do appear less convincing than they once were, however. Let us examine the usual objections and critiques.

A. Common Law Jurisdictions and Related Rights

The Rome Convention has not historically been particularly friendly to common law jurisdictions. Indeed, as WIPO itself has noted:

The number of countries party to the Rome Convention has grown slowly. One of the main reasons for the limited adherence was the fact that countries following a common law tradition were not interested in acceding to the Convention since they were of the view that phonograms and broadcasts were already eligible for copyright protection.⁵⁸

The historical record supports this view. The Convention was adopted in 1961. Yet the following table shows that common law jurisdictions were late to join:

Country	Date of Accession
Australia	June 30, 1992
Canada	March 4, 1998
Jamaica	October 27, 1993
Nigeria	July 29, 1993
United Kingdom	October 30, 1963

Date of Accession⁵⁹

Not just the United States but other relatively important common law jurisdictions such as New Zealand and South Africa are not party to the Convention.⁶⁰

The exception to the rule seems to be the United Kingdom which, as the above table shows, joined early on in 1964. History reveals here again, however, the difficulty at hand.

57. *Id.* art. 12(1).

58. WIPO, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO 8 (2003).

59. *See id.* (WIPO, *Contracting Parties > Rome Convention*, available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17. The treaty enters into force three months after accession.)

60. *See id.*

The United Kingdom negotiated not to introduce performers' rights as separate from copyright and protected performers against bootlegging under criminal law. This explains why both the Rome Convention and the TRIPS Agreement do not provide exclusive rights against unauthorized fixation of performances but rather only a "possibility of preventing" them.⁶¹ The reticence is understandable because adopting a related rights regime may be seen as an admission that sound recordings and performances are not (necessarily) copyrighted works. Yet, adaptation is possible as most common law jurisdictions now protect performers under a related rights regime.⁶²

Would adaptation by the United States be harder than joining Berne, which required abandoning mandatory formalities and introducing a (very limited) moral right?⁶³ The United States has already ratified a treaty requiring moral rights for performers, and the Rome Convention is more lax than Berne on the subject of formalities, as it allows for the imposition of a marking requirement, namely the ® notice.⁶⁴

B. The United States Position on the Rome Convention

The United States Copyright Act does not officially recognize a related rights category. Sound recordings are copyrighted works.⁶⁵ In practice, however, there are three levels of copyright in the statute: (1) a full (Berne level) copyright for authors of certain works of the visual arts, which benefit from the rights in 17 U.S.C. §§ 106 and 106A; (2) a set of copyright rights which is more or less the equivalent of Berne economic rights for all works not affected by section 106A and other than sound recordings;⁶⁶ and (3) a "related right-like"

61. *Rome Convention*, *supra* note 19, art. 7(1); *TRIPS Agreement*, *supra* note 19, art. 14.1. This was recognized in the RECORDS, *supra* note 39, at 43 ("[I]t was understood that this expression was used in order to allow countries like the United Kingdom to continue to protect performers by virtue of criminal statutes.").

62. To take an example from a jurisdiction mentioned in the table, in Australia, see *Copyright Act 1968*, ss 89-92 (Austl.), which protects rights in sound recordings as "subject-matter, other than works, in which copyright subsists" (emphasis added).

63. See Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J. L. & ARTS 1, 2-8 and 15-16 (1988).

64. On moral rights in the WPPT, see WPPT, *supra* note 52. On formalities, see *Rome Convention*, *supra* note 19, art. 11 (which provides in part "[i]f, as a condition of protecting the rights of producers of phonograms, or of performers, or both, in relation to phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the copies in commerce of the published phonogram or their containers bear a notice consisting of the symbol ®, accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of claim of protection.").

65. Under 17 U.S.C. § 101, "sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied. 17 U.S.C. § 102(a) defines "works of authorship:" as including sound recordings.

66. 17 U.S.C. § 106A was added by § 5089 of the Visual Artists Rights Act of 1990, 104 Stat. at 5128 (Pub. L. No. 101-650).

right for sound recordings with some of the section 106 rights (that is, excluding public performance), defining the reproduction right specifically for sound recordings in section 114(b) and adding the right in digital audio transmissions.⁶⁷

Performances are not protected as works. Performers are mentioned twice in the Copyright Act, namely as holders of the anti-bootlegging right added in implementing the TRIPS Agreement,⁶⁸ and in the right to receive a set percentage of the monies collected by the collective designated to operate the digital audio transmission compulsory license (for certain non-interactive transmissions), namely SoundExchange, Inc.⁶⁹ The unauthorized fixation of performances may have been captured not under copyright but under the right of publicity, at least in certain states.⁷⁰

Then there are a number of constitutional law issues that this Essay will not address, including whether the anti-bootlegging statute is in fact validly adopted under the Copyright and Patent Clause.⁷¹ For our purposes, what matters is that performers have no spate statutory right under US copyright law except in the anti-bootlegging context. Audiovisual performers are in a more difficult situation because the work-for-hire doctrine applies to them.⁷²

A final note on the Rome Convention's impact in the United States. Failure of the United States to adhere has cost US performers and industry tens of millions of dollars in remu-

67. 17 U.S.C. § 106 provides exclusive rights in sound recordings, including a digital audio transmission right, but not a full public performance right due to the exclusion of sound recordings in section 106(4). Under 17 U.S.C. § 114(b), sound recording copyright holders' exclusive rights are defined as including: (1) the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording; (2) the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality; and (3) the right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

68. See *supra* note 51 ** 61 **.

69. SoundExchange administers the performer and producer rights in noninteractive digital transmissions of sound recordings under a compulsory license (17 U.S.C. § 114(e)(1) (2006).) and rates fixed by royalty judges, a system administered by the Copyright Office of the United States with an exemption from antitrust rules. For a discussion, see Daniel Gervais, *The Landscape of Collective Management Schemes*, 34 COLUM. J. L & ARTS 591, 597 and 608 (2011).

70. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (applying the Ohio right of publicity).

71. The fact that the protection applies to unfixed performances and is not limited in time led one court to question its validity. See *United States v. Martignon*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004) at 424-25; vacated and remanded by 492 F.3d 140 (2d Cir. 2007). The Second Circuit vacated and remanded, finding the anti-bootlegging provision validly adopted under the Commerce Clause. The Eleventh Circuit upheld the constitutionality of the provision in *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999).

72. Apparently even professional athletes can be considered workers-for-hire in that context. See *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.* 805 F.2d 663, 670 (7th Cir. 1986).

neration paid for the broadcasting of sound recordings that are not paid to United States rights holders because the Rome Convention and TRIPS allow reciprocity in this regard as opposed to the usual standard of nondiscrimination against foreign nationals known as national treatment.⁷³ To obtain the remuneration from Rome Convention members, the United States would have to ratify the Convention and establish a remuneration for the broadcasting of sound recordings. Many bills have been tabled in Congress, but opposition is fierce.⁷⁴

C. Originality of Performances in the United States

1. Sound recordings

Is the US statute stuck in its own contradiction(s) here? Treating a sound recording or a movie as a full copyrighted work means that it must be original.⁷⁵ In the case of a sound recording, originality can follow from the studio engineer's work, the producer's input and from the performance (of the main performers and possibly also the background performers).⁷⁶ That seems, to the Author at least, as an exhaustive list. The producer may be there mostly on a financial level, but some producers do make suggestions that pass the originality threshold.⁷⁷ In discussing one of the highest grossing albums of all time, Michael Jackson's *Thriller*, Mark Jaffe noted:

Anyone who purchased the album would associate *Thriller* with Jackson, the star attraction with the distinctive vocals. But the album was produced by a superstar in his own right, Quincy Jones . . . [who] supervised the recording session, vocal arrangements, rhythm arrangements, and musicians.⁷⁸

A producer may make "suggestions"; general suggestions face a copyrightability or perhaps more precisely an authorship policy issue, however.⁷⁹ One could argue that the producer is

73. *Rome Convention*, *supra* note 19, art. 16(1)(a). See Emery Simon, *GATT and NAFTA Provisions on Intellectual Property*, 4 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 267, 278 (1993).

74. See William Henslee, *What's Wrong With U.S.?: Why The United States Should Have a Public Performance Right for Sound Recordings*, 13 *VAND. J. ENT. & TECH. L.* 739, 749 (2011) ("Since the 1995 Sound Recording Act, both the 110th and 111th Congresses have introduced the Performance Rights Act, which would grant a royalty for all performances of sound recordings. Both attempts failed to make it to the House and Senate floors for a vote after passing in Committee." (Notes omitted)).

75. See *supra* notes 3 and 4 and accompanying text.

76. See Mark H. Jaffe, Note, *Defusing the Time Bomb Once Again – Determining Authorship in a Sound Recording*, 53 *J. COPYRIGHT SOC'Y U.S.A.* 139 (2006); and Phil Hill, Note, *Fix it in the Mix: Disaggregating the Record Producer's Copyright*, 26 *HARV. J.L. & TECH.* 325 (2012).

77. ***

78. Jaffe, *supra* note 77, at 601-02.

79. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir 2000) ("What Aalmuhammed's evidence showed, and all it showed, was that, subject to Spike Lee's authority to accept them, he made very valuable contributions to the movie. That is not enough for co-authorship of a joint work.

not unlike the maker of a collective work such as a periodical, where authorship belongs to the “organizer.” The statute defines collective works as works, “such as a periodical issue, anthology, or encyclopedia, *in which a number of contributions, constituting separate and independent works in themselves*, are assembled into a collective whole.”⁸⁰ One would have to see each contribution to the recording (performances, sound engineer, etc., as independent works).

Another version sees sound recordings as compilations, namely when the contribution is made to an album, which would then likely exclude singles.⁸¹ It also seems that the compilation of tracks by a single artist does not fit the policy purpose of “compilations.” Indeed, the word “compilation” is used in music often to describe an album with (typically pre-existing) recordings from several different sources.⁸² As an alternative to this second version, it has been argued that the individual songs are works specially ordered or commissioned by the record company.⁸³ The industry may have had some doubts about this theory because in 1999 it convinced Congress to add sound recordings to the list of works that can be made-for-hire.⁸⁴ This caused an uproar and Congress withdrew the provision less than a year later.⁸⁵

The Constitution establishes the social policy that our construction of the statutory term ‘authors’ carries out. The Founding Fathers gave Congress the power to give authors copyrights in order ‘[t]o promote the progress of Science and useful arts.’ Progress would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work.”)

80. 17 U.S.C. § 101 (emphasis added).

81. 17 U.S.C. § 101 defines compilations as works “formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” The statute adds that the term “compilation” includes collective works. See Jessica Johnson, Note, *Application of the Copyright Termination Provision to the Music Industry: Sound Recordings Should Constitute Works Made for Hire*, 67 U. MIAMI L. REV. 661, 673-74 (2013) (“[I]n cases where an artist is contracted for the completion of a ‘single’, this intent to use the recording in a collective work is not present, destroying the argument. Even if the single were to end up in an album later in time, the fact that it was not initially recorded with that purpose in mind causes it to fall outside of the statutory definition.”)

82. For example the album “20 Greatest Hits 1963 Original Artists,” described by the court in *Kings Records, Inc. v. Bennett*, 438 F. Supp. 2d 812 (M.D.Tenn. 2006). This seems to be supported by the Copyright office, which, in the instructions on the registration of sound recordings, notes the following: “If the claim extends only to the *compilation of preexisting sound recordings*, give the year in which the compilation was fixed.” Copyright Office, *Circular 56: Copyright Registration for Sound Recordings*, U.S. COPYRIGHT OFFICE at 3 (2014), available at <http://copyright.gov/circs/circ56.pdf> (emphasis added).

83. See Johnson, *supra* note 81, at 674-76.

84. See Entertainment Law Reporter, *Congress Repeals 1999 Copyright Act Amendment Making Sound Recordings Eligible to be Classified as “Works Made for Hire”*; *Pre-Amendment Status Quo Is Restored, Without Prejudice to Prior Positions of Recording Artists or Record Companies*, 22 No. 6 ENT. L. REP. 8 (2000).

85. Work Made for Hire and Copyright Corrections Act of 2000, H.R. 5107, 106th Cong. (2d

Either version of that theory would allow sound recordings to be considered as works made-for-hire.⁸⁶ That interpretation of the statute is, not surprisingly, supported by a number of players in the recording industry.⁸⁷ Some commentators see the simple fact of the 1999 amendment as an admission, however, or at least an interpretive direction, that sound recordings are not works made-for-hire despite the careful congressional language of the repeal.⁸⁸ Be that as it may, the need for originality for all copyrighted works persists.

Sound engineers are highly skilled. Their work is important. Is it copyrightable? There are three types of contributions to be considered.⁸⁹ The recording engineer is responsible for the actual recording session, where he captures the artist's performances. This process involves selecting and placing the microphones correctly. This type of technical work is not likely to make a creative contribution. The mix engineer is responsible for compiling the recorded sound into a final product. This involves adjusting volume levels, creating sound effects, etc. Finally, the mastering engineer is responsible for perfecting the sound and making minor improvements to the overall recording by making subtle frequency adjustments and adding effects. The last two categories of engineers may well make "creative contributions."⁹⁰

The industry seems to agree. The Recording Academy defines an engineer for the purposes of Grammy Award as a

person is present in the recording studio or at the location recording and is responsible for the process of recording and/or mixing a project as well as technical issues and decisions. He or she operates (or oversees the operation of) the equipment during the recording process and makes creative and aesthetic choices in order to realize the sound and concepts the artist and producer envision."⁹¹

Sess. 2000).

86. See 17 U.S.C. § 101 ("work made for hire") ("A 'work made for hire' is . . . a work specially ordered or commissioned for use as a contribution to a collective work . . .") (omissions added).

87. See Jerome N. Epping, Jr., Comment, *Harmonizing the United States and European Community Copyright Terms: Needed Adjustment or Money for Nothing?*, 65 U. CIN. L. REV. 183, 198 (1996).

88. See Kathryn Starshak, *It's the End of the World as Musicians Know It, or Is It? Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings*, 51 DEPAUL L. REV. 71 (2001).

89. The Author is most grateful to Alandis Brassel (J.D. Vanderbilt, 2014), a sound engineer, for explaining the roles of the various engineers involved in the production of sound recordings.

90. See DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 131 (8th ed. 2012) ("Closely akin to producers are mixers . . . [.] Basically, these folks take the multitracks and throw them into a blender to produce a mystical potion of sublime music. Great mixers can make a huge difference in the success of a record[.]").

91. *Engineer: GRAMMY® Award Eligibility Crediting Definitions*, at 2, available at http://www.grammy.org/files/pages/Engineer_Definitions.pdf.

The industry practice does not consider engineers generally as authors. If they were, unless the work made for hire doctrine applied – which is doubtful in light of the analysis above – then the industry would face a significant difficulty because engineers rarely, if ever, sign copyright transfer agreements.⁹²

If performers and perhaps also sound engineers are authors, then they would be in a position to obtain the reversion of any copyright transferred by contract (not work made for hire) 35 years after any transfer that occurred on or after January 1, 1978.⁹³

2. Motion pictures

A motion picture is a mix of directing and acting and typically many other contributions, all on the basis of a screenplay. As the Ninth Circuit explained in *Aalmuhammad*, the list of contributors is long:

Who, in the absence of contract, can be considered an author of a movie? . . . [T]hat might be the producer who raises the money. Eisenstein thought the author of a movie was the editor. The ‘auteur’ theory suggests that it might be the director, at least if the director is able to impose his artistic judgments on the film. Traditionally, by analogy to books, the author was regarded as the person who writes the screenplay, but often a movie reflects the work of many screenwriters. Grenier suggests that the person with creative control tends to be the person in whose name the money is raised, perhaps a star, perhaps the director, perhaps the producer, with control gravitating to the star as the financial investment in scenes already shot grows. Where the visual aspect of the movie is especially important, the chief cinematographer might be regarded as the author. And for, say, a Disney animated movie like “The Jungle Book,” it might perhaps be the animators and the composers of the music.⁹⁴

In most cases, the many contributions are melded into a single work made for hire whole upon the execution of an agreement to that effect.⁹⁵ This eliminates the determination of individual authorship. Contracts between the major studios and the Screen Actors Guild (SAG/AFTRA) and the Screenwriters Guild then apply to determine the sharing rules for certain uses of the film and the splits of receipts from foreign collective management orga-

92. This is well described in the film TOM DOWD & THE LANGUAGE OF MUSIC (2003).

93. See Starshak, *supra* note 88.

94. *Aalmuhammad v. Lee*, 202 F.3d at 1232-33 (omission added)

95. 17 U.S.C. § 101 (“work made for hire”) (“A ‘work made for hire’ is . . . a work specially ordered or commissioned for use . . . as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”) (omissions added).

nizations that collect private copying levies.⁹⁶

A preexisting screenplay is an easy case: It is a discrete (literary) work.⁹⁷ The case is harder for the direction and acting.⁹⁸ In *Garcia*, the court was correct to say that the plaintiff's performance exhibited the traits of a creative contribution. As with musical performance, there is indeed ample room for creativity in performing a screenplay for lead actors, even while following the director's instructions. Whether the "extras" can then be compared to background singers—to the extent that their room for Feistian creative choices seems more limited strikes the Author as a valid question.

Whether an audiovisual performance is *separately copyrightable* in cases where it is not a work made for hire due to lack of consent is another matter. Under international law, the matter is simple enough: a performer must consent to the fixation under both the Rome Convention and under the Beijing Treaty.⁹⁹ The impulse that informed the *Garcia* court—and its underlying normative heftstrikes me as valid: requiring consent for the fixation to exhaust the performers' rights. In other words, the Ninth Circuit's intuition that (a) an actor should have rights where consent to fixation is in doubt and (b) that her contribution is "creative" are both correct. Unfortunately, because the only vehicle that seemed available under U.S. law is "copyright," the court was more or less compelled to apply *Feist* and the notions

96. See Adriane Porcin, *Of Guilds and Men: Copyright Workarounds in the Cinematographic Industry* 35 HASTINGS COMM. & ENT L.J. 1, 33-34 (2012) (describing the guild arrangements as 'workarounds' the European notion of authorship).

97. As the *Garcia* court also noted. See *Garcia*, 743 F.3d at 1264 ("A screenplay is itself a copyrightable creative work.")

98. The border is often unclear. Choreographies are protected by copyright (and named as such in 17 U.S.C. § 102(a)(4)) but the border between unfixed choreographies and the performance is very fuzzy. Though this is for another article, my intuition is that the border can be drawn using the distinction between imitation and reproduction. I can reproduce a choreography while varying stylistically, as seems to have happened in the Anne Teresa De Keersmaeker v. Beyoncé example. See Judith Mackrell, *Beyoncé, De Keersmaeker – And a Dance Reinvented by Everyone*, GUARDIAN, Oct. 9, 2013, available at <http://www.theguardian.com/stage/2013/oct/09/beyonce-de-keersmaeker-technology-dance>. By contrast, one can imitate but not "reproduce" Clark Gable's performance in *Gone with the Wind*. This is of course an issue that would need much more in depth treatment.

99. See *supra* notes 36 and 54 and accompanying text. As of this writing (August 2014), as explained in Part II D above, it is unlikely that the United States will ratify Rome. Whether the Beijing Treaty will be ratified is unclear. See Hannibal Travis, *WIPO and the American Constitution: Thoughts on a New Treaty Relating to Actors and Musicians*, 16 VAND. J. ENT. & TECH. L. 45 (2013) (arguing that changes to United States law required to comply with the treaty might violate the First Amendment and other aspects of the Bill of Rights).

of derivative work,¹⁰⁰ work made-for-hire,¹⁰¹ and joint work¹⁰² to the situation at hand. That is in large part why the outcome seems messy to a number of commentators.

A related rights regime does not have to address those issues because performers have rights that are separate from the underlying copyright in the audiovisual production. As a result of the creation of related rights, most countries do not have a “Garcia issue”: they protect musical and audiovisual performances under a related right. For actors, this may include a loss of exclusive rights but as already noted *only after consent to the incorporation* of the performance in the audiovisual production (or some other arrangement meant to allow the producer to exploit the work).

CONCLUSION

A related rights approach is not a legal panacea. It would, however, have several advantages. First, it would provide US performers with a right under the Rome Convention to obtain their share of foreign remuneration paid for the broadcasting of phonograms. Second, it would allow for the recognition of a “consent to fixation” right in audiovisual performances, subject to First Amendment scrutiny. The “horrific”¹⁰³ situation of *Garcia v. Google*, in which completely understandable impulses informed the court’s conclusion, would not arise. Third, and perhaps most importantly, it would formally separate sound recordings from musical works and greatly simplify the issue of authorship in sound recordings, because the need for originality would be replaced by a series of well delineated, limited rights. As the reversion litigation over who is the author of sound recordings gets underway, Congress could and should ameliorate a difficult situation for industries already facing a challenging transition to a fully digital environment.

100. *Garcia*, 743 F.3d at 1262-63 (“A film is typically conceived of as ‘a joint work consisting of a number of contributions by different ‘authors’,” citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.05 at 6-14 (1990)).

101. *Garcia*, 743 F.3d at 1264 (“Where, as here, an actor’s performance is based on a script, the performance is likewise derivative of the script, such that the actor might be considered to have infringed the screenwriter’s copyright.”).

102. *Garcia*, 743 F.3d at 1265 (“Under the work for hire doctrine, the rights to Garcia’s performance vested in Youssef if Garcia was Youssef’s employee and acted in her employment capacity or was an independent contractor who transferred her interests in writing.”).

103. *See supra* note 2.